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IN THE

Supreme Court of the United States

October Term 1969

No. 630 Misc.

RALPH PICCIRILLO,

Petitioner,

—against—

NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a Writ of Certiorari in order to review an order of the Court of Appeals of the State of New York, dated April 24, 1969, which affirmed an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated June 3, 1968 which in turn affirmed a judgment of the Supreme Court of the State of New York, Kings County, rendered on January 19, 1966, convicting petitioner of the crime of Attempted Bribery as a Felony.

Previous Proceedings

Petitioner was convicted by judgment of the Supreme Court of the State of New York, rendered January 19, 1966, upon a plea of guilty during trial, of the crime of Attempted

Bribery as a Felony, which sentenced him to 1½ to 3 years in prison.

The Appellate Division of the Supreme Court of the State of New York, affirmed without opinion on June 3, 1968, with one Justice dissenting in an opinion reported at 30 A.D. 2d 664. The Court of Appeals of the State of New York, by four to three decision affirmed with majority and dissenting opinions on April 24, 1959. (24 N.Y. 2d 598)

Jurisdiction

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. Section 1257 (3). Petitioner contends he was denied his rights under the Fifth and Fourteenth Amendments to the United States Constitution because he was indicted for a crime concerning which he claims he was granted immunity. He also claims that his right to counsel was violated under the Sixth and Fourteenth Amendments because he was not allowed to consult with his attorney when he was in the Grand Jury. Respondent takes the position that no substanted federal question exists.

Facts

On March 19, 1964, petitioner and a co-defendant, Anthony Labello, were arrested for assaulting one Jack Graham at a housing project in Brooklyn; apparently with tire irons. The beating was believed to be at the direction of others, who paid Labello and Piccirillo, and the investigation which later ensued resulted in various indictments secured by the New York County District Attorney involving a "painting scandal" in connection

with property maintained by the New York Housing Authority (Minutes of Sentence 1/19/66 3-8).

On March 20, 1964, petitioner attempted to bribe Patrolman William A. Sewell, the Housing Authority Officer, the day after he arrested the two men for the assault. He recovered the fire irons and the next day, in Criminal Court, was offered money to change his testimony and get rid of the weapons. A meeting was set up for that evening and the officer met with the men, with minifon equipment on him and the offer was made again (Grand Jury Minutes, 3/22/65 6-13). The defendants were not arrested until after indictment which was handed down on July 14, 1965.

On January 11, 1965, Piccirillo and Labello were sentenced for the Attempted Assault charges after having pleaded guilty. They, thereafter, on March 18, 1965, were both called into the Grand Jury, were given immunity and were interrogated about the circumstances of the assault in an obvious attempt to learn who was behind the whole scheme, an attempt which proved fruitless. On March 22, 1965, Officer Sewell testified and on July 14, 1965, the Attempted Bribery Indictment was handed down.

On August 9, 1965, both men pleaded guilty but the pleas were later withdrawn on November 10, 1965.

A motion was made by both men for an inspection of the Grand Jury minutes and for the dismissal of the indictment on the ground that the immunity afforded them also extended to the Bribery charge, but their application was denied on December 13, 1965, by Hon. David L. Malbin, who also wrote an opinion. The Court held that the testimony given by defendants "could not be construed in

the slightest degree that it offered a lead or suspicion" to the Bribery charge. That issue, and the scope of the immunity given was the issue on appeal.

After their applications were denied, the defendants pleaded guilty on December 17, 1965, during trial, and were sentenced as aforesaid on January 19, 1966.

POINT I

The scope of the immunity after petitioner, as construed by the Court of Appeals of the State of New York, is co-extensive with his constitution privilege against self-incrimination although it affords protection which is only testimonial and not transactional in nature.

The Court of Appeals held in this case, 24 N.Y. 2d 598 (1969) that the New York immunity statute (now C.C.P. 619 c and d) "only bars the use of the witness' testimony and any evidence derived therefrom" (p. 604). The Court treated the question of whether such immunity was sufficient under the Constitution as follows (p. 602):

> "Time has shown that this 'transaction' immunity type of statute was unnecessarily broad, that it gives witnesses an immunity not required by the Constitution and that it has the effect of giving an unnecessary 'gratuity' to crime. Where the People have a completely good case against a defendant without his testimony, there is not a single, sound policy reason, nor is there a constitutional compulsion, requiring that a grant of immunity gain a witness complete freedom from criminal liability for his wrongful acts simply because the acts were at some point mentioned to the Grand Jury (*People* v. *Laino*,

10 N Y 2d 161, 173). If he is protected from the use of his testimony or the fruits thereof, he loses nothing if he is then convicted on independent and untainted evidence."

A reading of *Murphy* v. *Waterfront Comm.*, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed 2d 678 (1964) and *Malloy* v. *Hogan*, 378 U.S. 1, 12 L. Ed 653, dispels all uncertainty as to the constitutionality of C.C.P. 619 c and d as construed in *La Bello*. The Murphy case holds "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." (84 S. Ct. at 1609).

Read together with the holding in *Malloy* v. *Hogan, supra*, "that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states" (84 S. Ct. 1492), the conclusion is inescapable. The standard enunciated in Murphy as applicable between State-Federal investigations and prosecutions must equally apply to interstate and intrastate criminal proceedings. The Supreme Court in Malloy continued p. 11:

"It would be incongrous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified."

The *Murphy Case, supra* in overruling *Feldman* v. *United States* (322 U.S. 487) and other similar cases prescribed the

one applicable standard governing prosecutions subsequent to a grant of immunity—that the testimony elicited from a witness under a grant of immunity cannot be used against the witness in any criminal proceeding. As was stated by Mr. Justice White (with Mr. Justice Stewart, concurring) p. 106:

> "The Constitution does not require that immunity go so far as to protect against all prosecutions to which the testimony relates, including prosecutions of another government, whether or not there is any casual connection between the disclosure and the prosecution or evidence offered at trial. In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity."

The New York immunity statute as construed in this case, affording as it does a bar to the use of any evidence directly or indirectly derived from compelled testimony against the person compelled to testify, is protection co-extensive with the privilege against self-incrimination. That the statute need go no further may be confirmed by a reading of the constitutional provision itself, that no person "shall be compelled in any criminal case to be a witness against himself" U.S. Const. Amend. V. If evidence is derived totally independent of the testimony, the witness cannot be deemed to be "a witness against himself" under any conceivable construction one may place upon that language.

POINT II

The immunity afforded petitioner did not extend to the crime of attempted bribery.

The facts in this proceeding are virtually undisputed and only one major issue is presented. After petitioner pleaded guilty to the Attempted Assault and was later, after a grant of immunity, required to give testimony in the Grand Jury, he was subsequently indicted for Attempted Bribery. Prior to finally accepting a plea, a motion to dismiss the indictment was made based on the theory that the immunity afforded extended also to the Attempted Bribery charge. Mr. Justice Malbin, in an opinion dated December 13, 1965, denied the motion and took the position which respondent takes now and submits is a correct analysis of the existing law regarding this situation. The Court said:

> "Among the contentions raised by the defense, that the defendants when they appeared as witnesses before the Grand Jury received full and extensive immunity that encompassed the present indictment, is without merit. The testimony furnished by them could not be construed in the slightest degree that it offered a lead or suspicion that their testimony was related to the allegations set forth in this indictment."

Immunity is governed by Section 2447 of the Penal Law, which is now found in Section 619 of the Code of Criminal Procedure, and to supplant the constitutional privileges of a witness he must be afforded testimonial protection. It must be co-existent with the protection provided by the Constitution (*Counselman* v. *Hitchcock,* 142 U.S. 547; *Brown* v. *Walker,* 161 U.S. 591; *Hale* v. *Henkel,* 201 U.S. 43. But even if the immunity provided must also be transactional in nature,

petitioner would not be protected from a Bribery charge in this case. Courts which have interpreted the meaning of transactional immunity have held that any testimony that the witness gives in response to relevant questions which indicates he may have committed another crime, although not connected with crimes then under investigation, cannot be used against him directly, or as a link in the chain of evidence and he cannot be prosecuted for such crimes even with the use of other evidence (*Matter of Cioffi*, 8 N.Y. 2d 220; *People* v. *Breslin*, 306 N.Y. 294, cert. den. 347 U.S. 1014; *People* v. *Brayer*, 6 A.D. 2d 437. The other crimes must be crimes which his testimony revealed or which grew out of his testimony. Thus, Courts have also spoken of the necessity that the testimony be revealing or self incriminating (*People* v. *Reiss*, 255 App. Div. 509, 516, affirmed 280 N.Y. 539; *United States* v. *Niarchos*, 125 F. Supp. 214; *United States* v. *Onassis*, 125 F. Supp. 190; *Himmelfarb* v. *United States*, 175 F. 2d 924, cert. den. 338 U.S. 860; *Kvonck* v. *Cooney*, 244 Iowa 153; *Halpin* v. *Scott*; 415 Ill., 104; *People* v. *Norwood*, 312 Mich. 266; *People* v. *Breslin*, *supra*; *People* v. *Brayer*, *supra*; *Matter of Cioffi*, *supra*; *Matter of Second Additional Grand Jury*, 10 A.D. 2d 425.

This is in keeping with the obvious purpose of immunity statutes to secure evidence which is self-incriminating and otherwise unavailable without the protection given by a grant of immunity (*United States* v. *Niarchos*, *supra*; *United States* v. *Onassis*, *supra*). To hold otherwise would be to strain the interpretation to be placed on Section 2447 and turn it into a "shield for the guilty") *People* v. *Rine*, 173 Misc. 1010, 1015). It can be stated generally that the protection from prosecution for other crimes only extends to crimes regarding which a witness directly testifies or gives evidence concerning which are revealed by his testimony and which are substantially

connected with the evidence given (*Heike* v. *United States*, 227 U.S. 131).

Even in *People ex rel Coyle* v. *Truesdell*, 259 App. Div. 282, relied on below heavily by petitioner, in determining whether the witness was immune from the subsequent prosecution an inquiry was made as to whether his answers were actually incriminating or could be used to establish facts against him.

In the instant proceeding, the answers given by petitioner revealed nothing, were not incriminating and did not remotely relate to the subject of the second prosecution. The bribery prosecution was not related to the subject then being investigated by the Grand Jury, whether others instigated the assault and whether improprieties existed regarding painting contracts with the New York Housing Authority. By the terms of the explanation of the immunity given by the prosecutor in the Grand Jury, petitioner could not reasonably have considered the immunity to be as broad as he now urges it is.

The Court below examined the minutes of the Grand Jury and saw that the Assistant District Attorney told the petitioner that the Grand Jury was investigating the assault committed on Jack Graham and all conspiracies connected with the assault (Grand Jury Minutes 3/18/65 5, 63). Petitioner was also told that he could not be prosecuted on account of any answers they might give (Grand Jury Minutes 3/18/65 6, 7, 63, 64). Extensive interrogation was had and the petitioner gave answers, although apparently not satisfactory, concerning the circumstances of the assault and the events leading up to it (Grand Jury Minutes 3/18/65, 5-62, 63-100). No mention of the attempted bribe was made and the weapons were discussed only insofar as the witness was

asked to describe the assault itself, where the weapons were obtained and questions were asked of a similar nature. No mention of the name of Patrolman Sewell, the officer whom the petitioner offered the bribe to was made and the circumstances of the arrest or the arraignment the next day, when the bribe was offered, were not gone into in the slightest. Petitioner's contention is that because one of the things he offered Sewell money for was to lose the weapon and since the weapon was mentioned during the bribe offer, although in a totally different context, the mere fact that the weapons were mentioned or described makes the subsequent indictment invalid because the weapon was a "thing" testified to in the Grand Jury.

Such an argument stretches logic to the breaking point. The Attempted Bribery indictment was not based on the weapon and its essential elements did not depend in the slightest upon any evidence given by either defendant. Had petitioner admitted ownership of the weapons and then been prosecuted on a weapons charge or for an illegal possession violation, then truly he would have been subjected to prosecution because of things revealed in his testimony. Here, all the essential elements of the crime were included in the testimony of the officer upon whose evidence the indictment was based. The fact that petitioner possessed weapons with which he assaulted Jack Graham was nothing new but merely cumulative. This was already known, the petitioner had been indicted and had already pleaded guilty. No mention of the weapon would have to be made to sustain a bribery prosecution. Nothing was disclosed and it is the disclosure of facts not otherwise known or available which is the entire purpose behind calling witnesses to a Grand Jury and giving them immunity (*People ex rel. Hunt* v.

Lane, 132 App. Div. 406, affd. 196 N. Y. 520; *People* v. *Cahill*, 126 App. Div. 391 affd. 193 N.Y. 232; *United States* v. *Onassis*, *supra*). The witness only gets immunity regarding those matters actually testified to and not all things to which strained logic may lead (*People* v. *Fine*, *supra*). Broader interpretations than necessary to effectuate the purposes of immunity statutes should not be indulged in (*United States* v. *Niarchos*, *supra*).

The procedure followed by respondent and the Grand Jury in this case is not unusual in a proper case:

> "The condemnation that has been asserted against the practice of calling the accused as a witness in the very proceeding in which the charge against him is being investigated (*People* v. *Ferola*, 215 N.Y. 285), if it has any relation to cases where immunity is intended to be and is granted, would not seem to be applicable to an inquiry directed in good faith towards establishing the commission of crimes by others." (*People* v. *Reiss*, 255 App. Div. 509, 516, affirmed 280 N.Y. 539.)

The testimony of petitioner was not incriminatory nor did it reveal anything not previously known. The questions asked and the responses made were not reasonably connected with nor did they refer to the Attempted Bribery charge. The rationale of Mr. Justice Malbin's decision denying the motion below was a correct appreciation of the applicable law that under the facts of this case petitioner was not immune from the Attempted Bribery prosecution.

POINT III

The petitioner's right to counsel was not diluted. Even if technical interference existed it has no application to this case.

When Mr. Piccirillo appeared before the Grand Jury of Kings County he was told that the Grand Jury was investigating the assault on Jack Graham and any conspiracies in connection therewith. (G.J. min. 63). The meaning of statutory immunity was explained and the prosecutor said he would ask the Grand Jury to vote him immunity. He also said that after it was granted the witness could not be prosecuted in any crimes that his answers connected him with (G.J. 63-65).

The petitioner left the room and upon his return was informed by the foreman and prosecutor that he had been granted immunity (G.J. 64). Then after saying that he would answer the question he said "I'd just like to speak to my lawyer." The prosecutor replied:

> "Under these circumstances you are not a defendant, you are a witness, you have been given immunity. That means you cannot be prosecuted. Your rights are fully protected and there is no reason for your conferring with your attorney, do you understand that?"

Petitioner replied: "yes" (G.J. 65) and thereafter he was questioned at length (G.J. 65-100). No mention of the attempted bribe was made except that the fire iron was mentioned in that it was the weapon he was paid to use on the victim of the assault.

Respondent will be the first one to agree with petitioner that the right to counsel is extremely important and, de-

pending upon the circumstances, a witness in a grand jury should generally be permitted to consult with counsel who is presumably in the hallway unless it will unduly disrupt the proceedings.

Respondent submits however, that this principle does not apply to the case at bar. If the witness is ultimately prosecuted for perjury or contempt it could be argued that had he been allowed to consult counsel he could have been advised that a proposed answer or course of action might be perjurious or contemptuous. It could then be said that counsel could have played a significant role and that the witness' desire to consult could be for other purposes than to seek aid in how to answer the question in an improper manner.

Where, as here, however, the prosecution is for a substantive crime not then under investigation and not fairly connected with the testimony, the violation of the right to counsel, if any, is irrelevant. It could make no difference since petitioner could not have asked his lawyer about things which were apart from the proceedings at that time.

In addition, the record shows that the request was not regarded as important by petitioner himself and the entire pattern of questions and answers shows that no real assistance was necessary or could have been given. When the only aid sought would or could have been in the answering of difficult or embarassing questions the denial of the request should not be considered to be a denial of constitutional rights. *People* v. *Ianiello*, 21 N.Y. 2d 418, 426.

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York
November 25, 1969

Respectfully submitted

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